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No. 89-902

In the Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO.-CONN., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation's claim for punitive damages in a common-law fraud action, assigned to it from a distressed bank, violates statutory restrictions, the Excessive Fines Clause of the Eighth Amendment, or the Due Process Clause of the Fifth Amendment.

2. Whether the court of appeals erred in remanding this case for a new trial on the issue of damages.

3. Whether the court of appeals correctly applied the rule set forth in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), in declining to direct a new trial on the issue of liability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-15A) is reported at 877 F.2d 614. The opinion of the district court denying petitioners' motion for judgment n.o.v. (Pet. App. 17A-39A) is reported at 691 F. Supp. 87. The memorandum opinion and order of the district court granting in part and denying in part petitioners' motion for summary judgment (Pet. App. 41A-51A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1989. A petition for rehearing was denied on September 11, 1989. Pet. App. 54A-55A. The petition for a writ of certiorari was filed on December 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioners were seeking to acquire an interest in three natural-gas fields in Mississippi. Petitioners approached their banker, Continental Illinois National Bank, to obtain financing for the purchase. Petitioners sought a $75 million "nonrecourse production payments loan"—a loan that would be payable exclusively from the revenues petitioners generated from the production of gas from the three fields. Before the loan was finalized, petitioners learned that a well drilled in one of the fields had struck water instead of gas, that the field would produce no natural gas, and that the field would generate no revenues for the repayment of the loan. Although petitioners were sufficiently distressed by that news that they attempted to terminate their acquisition of the Mississippi properties, petitioners failed to disclose those facts to Continental prior to the closing of the loan. Three years after the loan closed, petitioners sent to Continental a copy of a lawsuit they had filed against the sellers of the Mississippi fields; the lawsuit alleged that the sellers had defrauded petitioners by failing to disclose the water problem prior to the sale. Pet. App. 3A-5A.

In June 1984, Continental filed suit against petitioners, seeking compensatory and punitive damages on a variety of theories including fraud under the common law of Illinois. The loan balance at that time was over $76 million, even though the loan was due to be repaid in only three months. Pet. App. 5A, 49A.

2. In July 1984, as a result of severe financial problems encountered by Continental, the FDIC implemented an assistance program to infuse funds into the troubled bank. As part of that program, in October 1984, the FDIC was assigned numerous loans from Continental, including the loan to petitioners regarding the Mississippi properties. The FDIC was then substituted as plaintiff in this action. Pet.

App. 2A; see *FDIC* v. *Morley*, 867 F.2d 1381, 1383 (11th Cir.) (describing Continental assistance program), cert. denied, 110 S. Ct. 75 (1989).

After a trial, the jury returned a verdict in favor of the FDIC on the issue of liability and awarded $25 million in compensatory damages and $75 million in punitive damages. The district court denied Grace's post-trial motions for judgment n.o.v. and a new trial. The court held that under both federal and state law, Continental had properly assigned its punitive damages claim to the FDIC, and that petitioners' challenges to the jury instructions were meritless. The court also rejected petitioners' constitutional attack on the punitive damages award, holding that the Eighth Amendment's Excessive Fines Clause was "inapplicable to the imposition of punitive damages in a civil fraud suit," and that the procedures for the assessment of punitive damages in this case were adequate to protect petitioners' due process rights. The court, however, found the jury's punitive damages award to be excessive and ordered a remittitur of $50 million. The FDIC accepted the remittitur in lieu of a retrial on the issue of damages. Final judgment was entered in favor of the FDIC in the amount of $25 million in compensatory and $25 million in punitive damages. Pet. App. 2A, 21A-29A, 30A-36A, 38A, 54A-57A.

3. The court of appeals affirmed the finding of petitioners' liability for fraud, but reversed the damages award and remanded for a new trial limited to damages. Pet. App. 1A-15A. Although the court rejected petitioners' constitutional and state law claims that the punitive damages award was excessive, *id.* at 12A-13A, the court held that a remand was required because the FDIC had not carried its burden of presenting evidence that would permit a proper computation of compensatory damages. *Id.* at 14A. The court stated that "[t]he amount of punitive damages, related as they are

to compensatory damages, will have to be redetermined as well in the new trial that we are ordering." *Id.* at 15A.

ARGUMENT

Petitioners urge this Court to grant review in order to address a variety of issues arising from the FDIC's request for punitive damages and the court of appeals' decision to remand this case for a retrial limited to damages. Those issues, however, are not ripe for this Court's review.

The court of appeals remanded this case to the district court for a retrial on the issues of compensatory and punitive damages. As such, the case is in an interlocutory posture. If petitioners are exonerated of punitive damages in the retrial, their statutory and constitutional claims will be moot. Alternatively, if petitioners are found liable for damages, and the court of appeals affirms such a judgment, petitioners may present their claims to this Court in a petition for certiorari at that time. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.").

Principles of finality apply with special force here because the underlying order – the grant of a new trial – would not have been reviewable in the court of appeals if it had been entered by the district court. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980) ("An order granting a new trial is interlocutory in nature and therefore not immediately appealable."); *Dassinger* v. *South Central Bell Tel. Co.*, 537 F.2d 1345 (5th Cir. 1976) (per curiam) (dismiss-

ing appeal from new trial order limited to damages). Petitioners should fare no better in requesting this Court to invoke its certiorari jurisdiction to review a new trial order. Compare *United States* v. *Ayres*, 76 U.S. (9 Wall.) 608, 610 (1870) (dismissing an appeal on the ground that an order granting a new trial has the effect of vacating the former judgment and rendering it null and void). At all events, petitioners' claims also lack merit.

1. Petitioners contend (Pet. 5-8) that the FDIC is not authorized by Congress to recover punitive damages and, therefore, cannot seek them in a retrial in this action. That contention overlooks the fact that the FDIC is proceeding in this case as assignee of a claim of Continental against petitioners. This is not a regulatory enforcement action against petitioners for violations of federal law. Rather, the FDIC was substituted for Continental as plaintiff under a statute empowering it to assist troubled banks by purchasing their assets. 12 U.S.C. 1823(c). Relying on that express power, the FDIC purchased certain of Continental's assets, including its fraud claim against petitioners. Congress placed no constraints on the FDIC's right fully to recover all relief available in such purchased claims, including punitive damages. 12 U.S.C. 1823(c). Because Continental was entitled to recover punitive damages in its fraud action against petitioners, so too can the FDIC as Continental's assignee.[1]

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[1] Relying on 12 U.S.C. 1823(c), the lower courts have widely recognized the assignability of claims to the FDIC, including fraud claims seeking punitive damages. See *FDIC* v. *Hudson*, 643 F. Supp. 496, 498 (D. Kan. 1986); *FDIC* v. *Main Hurdman*, 655 F. Supp. 259, 268 (E.D. Cal. 1987). Cf. *Brown* v. *New York Life Ins. Co.*, 152 F.2d 246 (9th Cir. 1945) (holding that the FDIC properly acquired an action for breach of fiduciary duty through purchase and assignment); *FDIC* v. *Abraham*, 439 F. Supp. 1150, 1152 (E.D. La. 1977) ("FDIC has the right to purchase an asset which amounted to a chose in action, [and] it likewise has the right to sue upon it and reduce it to judgment."). Contrary to

Petitioners' constitutional claims (Pet. 8-10) are far too abstract at this juncture to be appropriately considered by this Court. Whether or not the Excessive Fines Clause applies to the FDIC in this context, see *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 n.21 (1989), it surely applies only when there is an actual award of punitive damages. Here, of course, there is no such award. Likewise, petitioners' claim that Illinois law governing the imposition of punitive damages lacks the safeguards needed to protect petitioners' due process rights is not suitable for review on this record. The court of appeals did not pass on that question, and petitioners remain free on remand to propose any additional jury instructions that they believe are required to comply with the Due Process Clause. See *Western Fireproofing Co.* v. *W.R. Grace & Co.*, No. 88-2396 (8th Cir. Feb. 7, 1990), slip op. 12 (reproduced at Pet. Supp. Br. App. 11-12).[2]

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petitioner's suggestion (Pet. 8 n.7), state law does not restrict the FDIC's right to receive by assignment any asset of a failing or distressed bank. *National Union Fire Ins. Co.* v. *Continental Ill. Corp.*, 666 F. Supp. 1180, 1195 n.39 (N.D. Ill. 1987); *Main Hurdman*, 655 F. Supp. at 268; *FDIC* v. *Rectenwall*, 97 F. Supp. 273 (N.D. Ind. 1951); *Hudson*, 643 F. Supp. at 498; cf. *Chatham Ventures, Inc.* v. *FDIC*, 651 F.2d 355, 358 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982). Nor is there merit to petitioners' contention (Pet. 8) that the amount that the FDIC can recover as an assignee is controlled by the dollar limits found in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 951, 103 Stat. 498 (to be codified at 12 U.S.C. 1833a(b)), which impose civil penalties for violations of the national banking laws. The action here is for fraud, not statutory violations. Finally, *FDIC* v. *Jenkins*, 888 F.2d 1537 (11th Cir. 1989), cited by petitioners in a supplemental brief (at 3) does not aid their cause; that case, unlike the present one, did not involve an assigned claim for punitive damages based on fraud.

[2] Petitioners can derive no support from *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), in arguing (Pet. 10) that the punitive-damages instructions under Illinois law are too vague. In *Giaccio*, a state statute permitted a jury to impose costs upon an acquitted defendant without

2. Petitioners next argue (Pet 11-12) that this Court should exercise its "supervisory authority" to clarify the proper procedures to be followed when a damages award is set aside because of the absence of an adequate evidentiary foundation. There is no reason for this Court to review the general principles governing that issue, however, because the decision below is correct and is consistent with the applicable body of case law.

Petitioners contend (Pet. 11) that the FDIC should not be permitted to quantify its damages in a retrial because "a party is entitled to one, but only one, full and fair opportunity to prove its case." But the FDIC neither failed to prove an essential element of its claim, nor failed to establish any damages at all. Contrary to petitioners' contention, the court of appeals specifically stated that there were "huge stakes" in this case and that petitioners' "own projections of price and production from the producing fields showed that the [$75 million] loan would probably never be repaid." Pet. App. 13A, 14A. The court went on to describe the exact form of proof it thought to be required to quantify the FDIC's damages, thereby implicitly rejecting the district court's holding that other means of proving damages were sufficient. In effect, the court of appeals held that the legal theory under which the jury computed damages was incorrect.[3]

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specifying any standards, and the particular instruction used in that case (requiring that the defendant be found guilty of "some misconduct") was equally vague. 382 U.S. at 404. Here, in contrast, Illinois law requires the jury to determine whether petitioners' conduct was "wilful and wanton"; that phrase is defined as "[a] course of action which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference or conscious disregard for the rights of others." Pet. App. 33A. This standard is hardly unfamiliar to the law. *Smith* v. *Wade*, 461 U.S. 30, 39-41 & n.8 (1983).

[3] The district court had noted that petitioners themselves had sought "compensatory damages" of over $26 million from the seller of the

Petitioners are incorrect in arguing (Pet. 12) that the FDIC deserves only nominal damages rather than a new trial. In view of the uncontested and substantial arrearage of petitioners' $75 million loan, that contention borders on brazenness. Nominal damages are appropriate where damages are "meagre and indefinite," *Blake* v. *Robertson*, 94 U.S. 728, 733 (1877), or where compensation is sought for a "trivial deprivation of amenities," *Ustrak* v. *Fairman*, 781 F.2d 573, 579, 581 (7th Cir.), cert. denied, 479 U.S. 824 (1986). That is hardly the case here. In *In re Letterman Bros. Energy Securities Litigation*, 799 F.2d 967, 974 (5th Cir. 1986), cert. denied, 480 U.S. 918 (1987), the court declined to remand for a retrial on damages, but distinguished cases (like the present one) where the evidence was sufficient to support some damages award although not the one made, or where damages had been awarded under an incorrect legal standard. New trials in those settings do not constitute a "waste of judicial resources." Pet. 11.[4]

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the Mississippi properties. The district court also noted that there was "testimony that the properties were only capable of supporting a fifty million dollar loan." Finally, the court observed that the payment history of the loan warranted a conclusion that a $25 million immediate payment of principal might enable the eventual repayment of the loan by petitioners. Pet. App. 29A.

In the court of appeals' view, the FDIC was required to "estimate the present value of the loan to Grace at the time of trial, to add the interest that Continental had already received on the loan, and to subtract the sum from the principal and interest that Continental would have obtained from an alternative use of the $75 million that it disbursed on the loan." Pet. App. 13A.

[4] The double jeopardy principles announced in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), on which petitioner curiously relies (Pet. 11), are entirely inapplicable here. Unlike in *Halper*, where the defendant was criminally punished prior to the imposition of civil fines, petitioners have not paid even one "penalty" to the government. Indeed, it is far from clear whether even punitive damages awarded to the FDIC as assignee of a bank's claim would constitute a penalty payable to the government.

3. Finally, petitioners argue (Pet. 13-16) that the court of appeals' remand for a retrial limited to damages conflicts with this Court's rule in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). Petitioners' factbound quarrel with the application of settled legal principles presents no issue warranting this Court's attention.

In *Gasoline Products*, this Court stated that a partial new trial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U.S. at 500. On the facts before it, the Court concluded that a partial new trial was inappropriate because "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." *Ibid.*

The question whether damages can be retried without retrying liability is a factual determination made by the court based upon the totality of circumstances in each case. *Maxey* v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984) (citing *Hadra* v. *Herman Blum Consulting Engineers*, 632 F.2d 1242, 1246 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981)). Petitioners' string citation (Pet. 14-15) of cases where courts have held that the issues were not separable illustrates the fact-sensitive nature of the inquiry.[5] But

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[5] See, *e.g.*, *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376, 1389 (1977) (a retrial on the issues of liability as well as damages was required because the issue of causation was intimately tied to both issues), later appeal, 625 F.2d 585 (5th Cir. 1980), cert. denied, 450 U.S. 921 (1981); *Simone* v. *Golden Nugget Hotel & Casino*, 844 F.2d 1031, 1040-1041 (3d Cir. 1988) (where jury awarded a lump sum damage award on multiple causes of action, some of which were subsequently reversed, the court found that the tangled and complex fact

petitioners ignore the numerous cases holding that on the particular facts, damages in fraud and other actions may be determined independently after a finding on liability. See, *e.g.*, *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1163 n.22 (10th Cir. 1985); *Watts* v. *Laurent*, 774 F.2d 168, 181 (7th Cir. 1985), cert. denied, 475 U.S. 1085 (1986); *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1166-1169 (7th Cir. 1983); *Manufacturing Research Corp.* v. *Greenlee Tool Co.*, 693 F.2d 1037, 1041-1042 (11th Cir. 1982); *Espaillat* v. *Berlitz Schools of Languages of America, Inc.*, 383 F.2d 220, 224 & n.14 (D.C. Cir. 1967); *Maxey* v. *Freightliner Corp.*, 727 F.2d at 353. See also 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2814, at 93 (1973 & Supp. 1989); 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 59.06, at 59-65 to 59-66 & n.37 (2d ed. 1989 & Supp. 1989-1990).

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situation necessitated a remand of both damage and liability issues); *Atlantic Coast Line R.R.* v. *Bennett*, 251 F.2d 934, 939 (4th Cir. 1958) (court without explanation concluded that the evidence relating to wilful misconduct was so inextricably tied up with that relating to primary negligence that a retrial of both issues was required); *Smyth Sales* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 44, 45 (3d Cir. 1944) (where the court noted that there was a "strong indication that the jury [had been] confused", it remanded both damage and liability issues); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.) (court reversed a district court decision ordering consolidation of 23 cases for a trial on liability only and ordering that damages be tried separately by separate juries), cert. denied, 366 U.S. 924 (1961).

In a supplemental brief, petitioners call this Court's attention to *Western Fireproofing Co.* v. *W.R. Grace & Co.*, No. 88-2396 (8th Cir. Feb. 7, 1990) (reproduced at Pet. Supp. Br. App. 1-12), where the court of appeals applied *Gasoline Products* to direct a new trial on both damages and liability on a particular record. There is no conflict in the circuits generated by yet another factbound decision in this area.

On the facts of this particular case, a retrial limited to damages is consistent with the rationale of *Gasoline Products*. The court of appeals' extensive and separate discussion of petitioners' liability for fraud and the evidence necessary to compute damages underscores that the issues are not so interwoven as to preclude a retrial on damages alone. The central issue on liability was whether the loan from Continental became final before petitioners found out that one of the fields involved in the loan was nonproductive. The central issue on compensatory damages involves determining the loan's present value, calculating the funds already paid on it, and estimating Continental's position had it used the funds for other purposes. Merely because some of the factual questions on damages may overlap with proof on liability is not sufficient to preclude a new trial limited to damages. *Manufacturing Research Corp.* v. *Greenlee Tool Co.*, 693 F.2d at 1041-1042.

At all events, the underlying purpose of the *Gasoline Products* rule will not be offended by a retrial limited to damages here. The purpose of the rule is to ensure that a party receives fair consideration of the issues to be retried and is not penalized by the absence of evidence that is principally relevant to other, interwoven issues. The Seventh Circuit has been particularly sensitive to the need to avoid potential unfairness when directing a separate retrial on damages alone. In *Watts* v. *Laurent*, 774 F.2d at 181, the court underscored that point by directing the trial court to protect the opportunity of a party "to present to the second jury whatever evidence * * * from the liability phase of the trial may be regarded as relevant in any way to the question of damages." That principle will doubtless be applied here as well. See Pet. App. 72A (counsel for petitioners estimated that a retrial on damages would take three or four weeks, allowing time to present "exculpatory material").

Under those circumstances, petitioners' fear of prejudice resulting from the limited remand is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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